

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.

FILED
PUBLIC UTILITIES COMMISSION
JANUARY 9, 2002
SAN FRANCISCO OFFICE
RULEMAKING 02-01-011

**ORDER INSTITUTING RULEMAKING REGARDING
THE IMPLEMENTATION OF THE SUSPENSION OF DIRECT ACCESS****Background**

“In California’s restructured electricity market, customers may subscribe to “bundled service” from the utility distribution company or “direct access” service from an electric service provider (ESP). Customers who purchase bundled service from the utility pay an energy charge to cover the utility’s power supply costs. For these bundled service customers, the customer’s total bundled bill includes charges for all utility services, including distribution and transmission as well as energy. A direct access customer receives distribution and transmission service from the utility, but purchases its electric energy from its ESP.

“A utility’s bundled customer can choose to become a direct access customer and later revert to bundled customer status. The utility is the electricity provider of last resort. The ability to leave the utility system and return may cause substantial fluctuations in the amount of energy the utility must purchase (or has purchased) on its behalf.

“Recent events in the California electric market have caused a radical change in the area of direct access. First, the Governor’s Proclamation of January 17, 2001, found that an emergency exists in the electricity market in California threatening ‘the solvency of

California's major public utilities,’ Second, on February 1, 2001, Assembly Bill No. 1 from the First Extraordinary Session (Ch. 4, First Extraordinary Session 2001) (AB 1X) was signed into law which, among other things, requires that the Department of Water Resources (DWR) procure electricity on behalf of the customers of the California utilities. In regard to direct access, AB 1X adds Section 80110 to the Water Code:

‘After the passage or such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department [the Department of Water Resources] no longer supplies power hereunder.’

“The section was effective February 1, 2001.” (Decision (D.) 01-09-060, pp. 2-3.)

In response to Water Code § 80110 we issued D.01-09-060, an interim order, effective as of September 20, 2001, in which we suspended the right to enter into new contracts or agreements for direct access after that date, and reserved for subsequent consideration and decision matters related to the effect to be given to all contracts executed or agreements entered into on or before the effective date, including renewals of such contracts.

In D.01-09-060, we specifically reserved any issues related to an earlier suspension date for a subsequent decision. As we stated: “All other pending issues concerning direct access contracts or agreements executed before today remain under consideration by the Commission and will be resolved in a subsequent decision.” (D.01-09-060, p. 8; see also, p. 9.) We also concluded that “[t]he effect to be given to contracts executed, agreements entered into or arrangements made for direct access [on or] before [September 20, 2001], including renewals of such contracts, as well as comments of the parties will be

addressed in a subsequent decision.” (D.01-09-060, p. 10 [Conclusion of Law 4] & p. 13 [Ordering Paragraph 9].)

In D.01-09-060, we explained our reasoning for suspending direct access after September 20, 2001. (D.01-09-060, pp. 4, 6, and 8; see also D.01-10-036, p. 7.) Further, suspension was mandated by the Legislature, and it was enacted in response to the emergency declared by the Governor’s Proclamation of January 17, 2001. (D.01-09-060, p. 3.) The Legislature left the determination of when direct access should be suspended to the Commission. (Water Code § 80110.)

In D.01-10-036, the order disposing of the rehearing applications, we modified D.01-09-060, and affirmed the decision as modified. D.01-10-036 added the following Findings of Fact to D.01-09-060:

- “3. The State has incurred an unprecedented debt to help weather the energy crisis.
- “4. Repayment of this debt to the State’s General Fund can be accomplished through the issuance of bonds at investment grade.
- “5. It is not in the public interest to permit customers to switch from utility bundled electric service to direct access service.
- “6. Avoiding cost-shifting and establishing a stable customer base justify why suspension of direct access should not be delayed.
- “7. It is not in the public interest for the Commission to delay action to suspend direct access service beyond this time.” (D.01-10-036, p. 23.)

In D.01-09-060, we recognized that merely suspending direct access was not enough. Many issues remained.

“All other pending issues concerning direct access contracts or agreements executed before today remain under consideration by

the Commission and will be resolved in a subsequent decision. In other words, effective today, no new contracts or agreements for direct access service may be signed; the effect to be given to contracts executed or agreements entered into before the effective date of this order, including renewals of such contracts or agreements, will be addressed in a subsequent decision. We put all those concerned about these matters on notice that we may modify this order to include the suspension of all direct access contracts executed or agreements entered into on or after July 1, 2001. Parties' comments regarding retroactive suspension, including the July 1, 2001 date, will be addressed by a subsequent decision.

"We direct the utilities not to accept any direct access service requests (DASRs) for any contracts executed or agreements entered into after the effective date of this decision."
(D.01-09-060, pp. 8-9.) (Emphasis added.)

This rulemaking is instituted to consider the pending issues regarding direct access.

Scope of Proceeding

All electric utilities subject to our jurisdiction are made respondents to this rulemaking. Pub. Util. Code § 1708 provides that the Commission "may at any time, upon notice to the parties, and with opportunity to be heard . . . , rescind, alter, or amend any order or decision made by it." By opening this rulemaking notice is provided that the Commission may modify or alter previous Commission decisions or rulings regarding direct access, including, but not limited to D.01-09-060, as modified by D.01-10-036.

In this rulemaking, the Commission will examine implementation issues concerning direct access, including: (1) whether it should affirm the direct access suspension date of September 20, 2001, or (2) whether it should make the effective date of the suspension of direct access July 1, 2001, or some other date, and (3) how the utilities should process DASRs.

To provide guidance to the utilities in regard to processing DASRs we shall consider:

1. Whether the utilities may set a deadline for the filing of DASRs.
2. What effect, if any, should be given to renewals of contracts originally entered into prior to the effective date of the Commission's suspension of direct access?
3. What effect, if any, should be given to provisions in contracts that allow the buyer to add more facilities to be served after the date on which direct access is suspended?
4. What effect, if any, should be given to provisions in contracts that allow for sale, transfer or assignment?
5. What other contract provisions should be considered?
6. Should we adopt a certified affidavit verification process to ensure that the DASR was for a contract entered into prior to the suspension date?
7. Should a charge be paid by all direct access customers to prevent cost shifting?

Preliminary Scoping Memo

Rule 6(c)(2) of the Commission's Rules of Practice and Procedure provides that the order instituting rulemaking "shall preliminarily determine the category and need for hearing, and shall attach a preliminary scoping memo." As this is a rulemaking, the category of this proceeding is preliminarily determined to be quasi-legislative, as that term is defined in Rule 5(d). All ex parte contacts shall be reported, pursuant to Rule 7.1.

A record concerning the suspension of direct access has been developed from the filings in Application (A.) 98-07-003, A.98-07-006, and A.98-07-026. However, those three dockets also contain pending litigation regarding the PX credit, which need not be decided at the same time as issues related to the suspension of direct access. We believe that it would be more efficient to keep

the record for the direct access suspension separate from the PX credit issues. Therefore, we open this rulemaking to provide a single docket for the admission of the record and pleadings on the issue of direct assess suspension. Rather than have the parties re-submit their filings in A.98-07-003 et al., we will take official notice of the pertinent information. We will continue to develop the record for this rulemaking through notice and comment (See Pub. Util. Code §§ 1701.1, 1708.5(f)). Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, we take official notice of:

1. The Assigned Commissioner's Ruling (ACR) of November 19, 2001, and all responses thereto;
2. The Administrative Law Judge's (ALJ) Ruling of November 16, 2001, and all responses thereto;
3. The ACR of October 23, 2001, and all responses thereto;
4. The ALJ's Ruling of October 11, 2001, and all responses thereto;
5. All applications for rehearing of D.01-09-060;
6. All comments on the three draft decisions and the alternate regarding the suspension of direct access;
7. The three draft decisions and the alternate circulated to the public regarding the suspension of direct access (Draft Decision filed August 27, 2001; Draft Decision filed August 15, 2001; Draft Decision filed June 15, 2001; and Alternate filed June 15, 2001);
8. Transcripts of the November 7 and the December 12 pre-hearing conferences; and
9. Any other documents issued or filed in related to the suspension of direct access.

Because we are incorporating the record of A.98-07-003 et al. into this rulemaking, we also incorporate that schedule. Any person who objects to the

preliminary categorization of this rulemaking, the need for hearing, or to the schedule, shall raise such objections by January 15, 2002. (See Rule 6(c)(2).)

A copy of this rulemaking shall be served on the respondents, and on the service lists to the following proceedings which have addressed direct access (A.98-07-003, A.98-07-006, and A.98-07-026). Further, this ruling shall be served on all registered electric service providers. We will continue to use those service lists as the service list for this proceeding, until further notice.

Any person interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor Office in San Francisco at (415) 703-2074, or in Los Angeles at (213) 649-4782.

Consistent with Rule 6(e), we expect that this proceeding will be concluded within 18 months.

Ex Parte Communications

This proceeding is subject to Rule 7, which specifies standards for engaging in ex parte communications and the reporting of such communications. Pursuant to Rule 7(a)(4) and 7(d), ex parte communications will be allowed in this proceeding without any restrictions until the assigned Commissioner makes an appealable determination of category as provided for in Rules 6(c)(2) and 6.4. However, consistent with Rule 87 we will require that all ex parte communications be reported, pursuant to Rule 7.1. Public interest will be served if all such communications are reported. Following the Commissioner's determination, the applicable ex parte communication and reporting requirements shall depend on such determination unless and until the determination is modified by the Commission pursuant to Rule 6.4 or 6.5.

O R D E R

Therefore, **IT IS ORDERED** that:

1. A rulemaking is instituted on the Commission's own motion to determine the proper implementation of the suspension of direct access, including:
(1) whether it should affirm the direct access suspension date of September 20, 2001, or (2) whether it should make the effective date of the suspension of direct access July 1, 2001 or some other date, and (3) how the utilities should process direct access service requests. This Order Instituting Rulemaking (OIR) incorporates the relevant portions of the record in Application (A.) 98-07-003 et al.
2. All electric utilities subject to our jurisdiction are made respondents to this proceeding.
3. The Executive Director shall cause this OIR to be served on respondents, on the service list in A.98-07-003, A.98-07-006, and A.98-07-026, and on all registered electric service providers.
4. Notice is hereby provided that this OIR may modify or alter previous Commission decisions or orders affecting direct access in the State of California.
5. The category of this rulemaking is preliminarily determined to be quasi-legislative. All ex parte contacts shall be reported, pursuant to Rule 7.1.
6. Any person who objects to the preliminary categorization of this rulemaking, the need for hearing, or the schedule shall submit written objections by January 15, 2002.

This order is effective today.

Dated January 9, 2002, at San Francisco, California.

LORETTA M. LYNCH
President

HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a concurrence.

/s/ HENRY M. DUQUE
Commissioner

R.02-01-011

Commissioner Henry M. Duque, concurring:

I support the concept of initiating a rulemaking to separately resolve issues related to suspending direct access. However, I am filing this concurrence because I take issue with a number of statements from prior decisions which are reiterated in the decision. I disagree with the findings and conclusions cited from the direct access rehearing decision. I believed that the rehearing applications raised a number of valid allegations of legal error. Primary among them were the allegations that the findings were not supported by record evidence, and a hearing was required.

I did not support killing direct access and disagree with the reasons for doing so repeated in the decision. I continue to believe that there are ways to structure direct access so as not to jeopardize the financial integrity of DWR, the state or the investor utilities.

/s/ HENRY M. DUQUE

Henry M. Duque
Commissioner

January 9, 2002
San Francisco, California